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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.215 OF 2007

Nahoor Amin Chinpade Appellant
versus
Rakirmohammad P. Shaikh Respondent

Mr.P.B.Shah for appellant.
Mr.A.M.Joshi for respondent.

CORAM : A.M.KHANWILKAR, J.
DATE : 06th August 2007

ORAL ORDER :-

1. Heard counsel for the parties. This Second Appeal deserves to be admitted as it raises substantial questions of law to which I shall refer to a little latter. Hence, Admit. Heard forthwith for final disposal by consent.

2. The appeal takes exception to the judgment and decree passed by the Principal District Judge, at Satara dated 21st December 2006 in Regular Civil Appeal No.4 of 2004. The said appeal emanated from a suit filed by the respondent initially for relief of injunction, and subsequently by way of amendment further relief of declaration of mandatory injunction was sought by the respondent against the appellant-defendant.

3. The said Regular Civil Suit No.125 of 1996 came to be decreed by the Trial Court by judgment and order dated 11th November 2003. Against the said decision the appellant-defendant carried the matter in appeal. By the impugned judgment and decree the District Judge has dismissed the appeal. In my opinion, it is apposite to reproduce the reasons recorded by the Appellate Court on the basis of which the appeal came to be dismissed, which reads thus:-

"Points | Findings

1. Does the Respondent prove that he has right to use the suit lane for the purposes of protecting his house from rain and encroachment of privacy as claimed? — Yes

2. Does he prove he is entitled for the declaration as claimed? — Yes

3. Does he prove that he is entitled for the mandatory injunction as prayed? — Yes

4. Is the judgment and decree of the trial court needed to be set aside modified or corrected? — No.

What order ? — Appeal dismissed

REASONS

8. All points together :- From the points to be resolved it is clear that

all the point materially cast burden on the Respondent to prove the alleged facts. The oral evidence of the Respondent is at Ex.53. The examination in chief is in the form of affidavit. On its perusal it is clear that it is pari materia with the allegations and contentions made in the plaint. On perusal of the cross-examination it is amply clear that the material allegations as regards the alleged use for 35 years, regarding fixing of stair case, existence of windows of bathroom, latrine and kitchen to the property of the Respondent are wholly unchallenged on the part of the appellant.

9. The oral version is also corroborated by the oral evidence of Noor Mohd. at Ex.57. On perusal of cross examination it is clear that the version is not dismantled in any manner in the cross examination. The photographs in respect of the premises were also proved by evidence of Hamid at Ex.56. The report of the court commissioner at Ex.18 also shows that the Report is unchallenged on the part of both the parties. On its perusal it is clear that the report vividly describes the actual situation and circumstances present on the spot in the impartial manner.

10. In addition to the above the photographs mentioned above proves the circumstances duly noticed by the commissioner. In view of the matter the evidence on the part of appellant of Abdul Rahiman at Ex.62. Munaf Amin at Ex.69, the maps Ex.78 and 79 do not rebut the facts proved by the Respondent.

11. In view of the above circumstances submissions made by the Ld. Counsel for the appellant cannot be accepted. Hence the points No.(i) to (iv) are answered in favour of the respondent. In the result the point No.(v) is answered accordingly. Hence the following order is passed.

ORDER

(i) The Appeal is dismissed with costs;

> (ii) As it appears from the record that this court has granted stay regarding mandatory part of the trial court's order in the interest of justice 90 days time for compliance of the said order is granted to the appellant, from the date of this order;
>
> (iii) Decree be drawn accordingly."

4. It is not in dispute that this decision is rendered by the First Appellate Court at the final hearing of the appeal. In other words, the First Appellate Court has not dismissed the appeal summarily at the admission stage in terms of powers under Order 41, Rule 11(1) read with Rule 11(4). The grievance before this Court is that the Appellate Court not only passed a cryptic judgment in relation to the points in issue on merits, but in spite of raising a specific plea of limitation by the appellant before the Appellate Court, as is noted in para no.4 of the impugned judgment, no formal point for consideration was framed in that behalf nor in the entire reasoning running into only two pages any reference is made by the Appellate Court to that aspect. It would have been a different matter if the Appellate Court was to reiterate the findings recorded by the Trial Court on the issue of limitation.

5. The substantial questions of law which would arise for consideration in the present appeal are as follows :-

(a) Whether the suit filed by the respondent and for the nature of claim, was barred by Law of Limitation?

(b) What is the scope of enquiry to be undertaken by the First Appellate Court while disposing of the First Appeal?

6. Having considered the rival submissions I have no hesitation in taking a view that the judgment under appeal cannot be allowed to stand even for a minute. As I have elaboratly reproduced the judgement of the Appellate Court in the earlier para, it is not necessary to underscore the point that the Appellate Court has disposed of the first appeal in a very casual manner by a cryptic decision. That cannot be countenanced. For, the approach of the Appellate Court, to observe sobriety, if I may say so, cannot stand the test of judicial scrutiny.

7. Significantly, the Appellate Court has not even formulated the relevant point for its consideration especially with regard to suit being barred by limitation or otherwise, though specifically raised on behalf of the appellant

and to which reference has been made by it in paragraph no.4 of the impugned judgment. It is well established position that even if the parties were not to raise the plea of limitation, it is the duty of the Court to examine the same if it arises for consideration. The obligation of the Court is still greater when the party specifically raises that issue. It would have been a different matter if the Court were to consider that issue and answer it one way or the other. The approach of the Court in not even formulating the issue of suit being barred by limitation or adverting to the same in the reasons portion of the judgment, cannot stand the test of judicial scrutiny.

8. In my opinion, it would be appropriate to relegate the parties to the First Appellate Court for reconsideration of all the points in issue on its own merits afresh.

9. Apriori, the impugned judgment deserves to be set aside and instead the first appeal preferred by the appellant which was filed before the District Court being RCA No.4 of 2004 will stand restored to the file to its original number to be decided afresh on its own merits in accordance

with law after formulating all necessary points that may arise for consideration.

10. Accordingly, this appeal succeeds in the above terms with no order as to costs. It is made clear that the Appellate Court shall reconsider the entire case afresh on its own merits in accordance with law uninfluenced by any observations made in the impugned judgment and order or for that matter the present order.

11. Parties are directed to maintain status-quo as of today with regard to the suit structure until further orders are passed by the Appellate Court as may be advised. Parties to appear before the First Appellate Court on 3rd September 2007 on which date that Court will issue necessary directions fixing the date of hearing of the appeal. The restored appeal be finally disposed of not later than end of December 2007.

12. A copy of this order be forwarded to the Registrar of this Court, who in turn shall bring it to the notice of the appropriate authority for necessary action in the light of the observations made in this judgment regarding the approach of the concerned Judge in disposing of the first

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appeal.

(A.M.KHANWILKAR, J.)